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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN E. HARBOUR,

Defendant and Appellant.

D052089

(Super. Ct. No. SCN223892)

APPEAL from a judgment of the Superior Court of San Diego County, Martin V. Staven, Judge. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

John E. Harbour entered a negotiated guilty plea to felony driving with a blood alcohol level of 0.08 percent or more (Veh. Code, § 23152, subd. (b)) with a prior similar conviction within 10 years (Veh. Code, § 23550.5, subd. (a)) (count 2) and admitted serving a prior prison term (Pen. Code, § 667.5, subd. (b)). He also entered a negotiated guilty plea to misdemeanor driving when his license was suspended for driving under the influence (Veh. Code, § 14601.2, subd. (a)) with a prior like conviction within five years

(Veh. Code, § 14601.2, subd. (d)(2)) (count 3) and misdemeanor driving without a valid license (Veh. Code, § 12500, subd. (a)) (count 5). The court sentenced him to prison for a stipulated term of three years: the two-year middle term on count 2 and one year for the prison prior. Harbour appeals, contending the court abused its discretion by denying his motion to withdraw the guilty plea. We affirm.

BACKGROUND

On May 29, 2007, in the course of motions in limine and other pretrial matters, the trial court denied Harbour's third *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) and began a change of plea hearing for the misdemeanors. Defense counsel noted that the lowest bid the prosecutor had offered for the felonies was four years and asked if a lower bid was possible. Counsel also asked the court if it had an indicated sentence. The court said no. After an off-the-record discussion between Harbour and defense counsel, the court recessed for lunch.

After lunch, the misdemeanor change of plea hearing concluded. The court ruled that evidence of Harbour's parole conditions would be excluded at the trial on the felonies and announced that it was ready for a jury. The prosecutor asked the court to advise Harbour that the previous offer of a four-year bid would be withdrawn and he faced six years in prison. The court told Harbour that the maximum sentence was six years and "[t]he agreement of four, basically, the moment the jury walks in, that's off the table, no longer under consideration." Harbour said he understood. By the end of the day, a jury was empanelled.

On May 30, 2007, just after the first witness was sworn, there was a three-minute unreported sidebar conference. The court excused the jury and recessed for 24 minutes. After the recess, the 11-minute felony change of plea hearing took place. Harbour acknowledged that he had filled out, initialed, and signed the change of plea form but said he did not understand a change that had been made on the form. Counsel and the court explained that a code section relating to an allegation had been crossed out and the remaining code section, Vehicle Code section 23550.5, subdivision (a), meant that Harbour was admitting a prior felony conviction. Harbour said he understood. After eliciting the guilty plea and admission described above, the court found that Harbour had freely, voluntarily, and knowingly waived his rights. It accepted the plea.

At sentencing on June 6, 2007, Harbour and his appointed counsel, David Thompson, told the court that Harbour wished to withdraw his guilty plea. Harbour made his fourth *Marsden* motion, which the court denied. The court appointed attorney Wilfrid Rumble to represent Harbour in the plea withdrawal matter. A week later, the court relieved Thompson as attorney of record and appointed Rumble. In August Rumble filed a motion to withdraw the plea. The prosecutor filed opposition. The hearing on the plea withdrawal motion, as well as Harbour's seventh *Marsden* motion, took place in November.

At the hearing on the withdrawal motion, Harbour testified that as to the misdemeanors, he felt he had to plead guilty so the jury would not hear about his prior driving under the influence convictions, he believed he would be able to challenge his prior and the denial of his motion to suppress evidence, and when he filled out the form,

the factual basis did not include the word "knowingly." As to the felony change of plea, Harbour testified as follows. On May 30 while the judge was speaking, Thompson wrote on a paper that the prosecutor's offer was three years and "will you accept it?"; "no"; "yes." Harbour said he wanted a couple of minutes to decide, but Thompson said he had to decide immediately and he should take the deal. Harbour circled "yes" because the first witness had been called, he knew he had no more time, he was anxious, and his blood pressure was elevated. He did not want to waive his rights to appeal the denial of his suppression motion or to challenge the constitutionality of his prior conviction. Thompson told him he could still appeal the priors and did not read the entire change of plea form to him. Harbour did not remember if he read the form himself before signing it. As Harbour and Thompson were going over the form, Harbour said he would not initial the box indicating a waiver of his right to appeal the denial of his suppression motion. Thompson took the form from Harbour and stared at him. Harbour then agreed to initial the box. He initialed the remaining boxes and signed the form.

On cross-examination, Harbour admitted that he had seven prior driving under the influence convictions, some resulting from guilty pleas. One conviction resulted from a trial where he represented himself and was sentenced to prison; he did not challenge the constitutionality of that conviction. He had been sentenced to prison three times. When he entered the plea, he knew that he was going to receive three years in prison.

The trial court noted that while "there [were] some slam-bang things that occurred," the change of plea "obviously it didn't happen in a couple of minutes." It found that Harbour was not credible, knew what he was doing when he entered the plea,

"and then got buyer's remorse as soon as he was given a little time to think about what might happen."

DISCUSSION

Harbour contends he was coerced into entering a plea agreement on the day of trial although he had a valid defense to the charges. He claims he did not have adequate time to consult with counsel, did not understand that he was waiving his right to challenge the constitutionality of his prior conviction, and did not want to waive his right to challenge the denial of his motion to suppress evidence.

Penal Code section 1018, which provides for a motion to withdraw a guilty plea, is to "be liberally construed to . . . promote justice." (§ 1018.) To prevail on the motion, however, the defendant must make a good cause showing by clear and convincing evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment [, including] inadvertence, fraud or duress." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208, citations omitted.) "A plea may not be withdrawn simply because the defendant has changed his mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) The denial of a withdrawal motion will not be reversed absent an abuse of discretion. (*Ibid.*)

We adopt the trial court's factual findings, including its credibility determination, because they are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) The record amply supports the court's conclusion that Harbour's plea withdrawal motion was simply a case of buyer's remorse. He had extensive prior

experience with the criminal justice system and was familiar with the change of plea process. During the change of plea hearing he did not hesitate to ask questions yet said nothing about the issues he raised in his withdrawal motion, including his desire to challenge his prior conviction and the denial of his suppression motion. The court did not abuse its discretion by denying Harbour's plea withdrawal motion.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.